STATE OF MICHIGAN

COURT OF APPEALS

JAY F. SCHMIDT and JACQUELINE SCHMIDT, Plaintiffs-Appellants, v WILLIAM J. STEPEK and SHIRLEY A. STEPEK, Defendants-Appellees.	UNPUBLISHED August 23, 2007 No. 274967 Lapeer Circuit Court LC No. 06-037265-CK

Before: Owens, P.J., and White and Murray, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I. Facts and Procedure

The parties, acting without the benefit of real estate experts, entered into a written agreement for the sale of plaintiffs' house to defendants. As required by the agreement, defendants tendered $10,000 in earnest money. In the event of defendants' failure to proceed to purchase, the contract entitled plaintiffs to retain the earnest money as liquidated damages, or to obtain specific enforcement of the contract. Specifically, the agreement states that

> [I]n the event of default by the Purchaser hereunder, the Seller may, at his option, elect to enforce the terms hereof or declare a forfeiture hereunder and retain the deposit as liquidated damages.

After defendants declined to proceed with the deal, plaintiffs deposited the earnest money into their own bank account, and then applied funds from that account toward the construction of a barn on their property. Plaintiffs thereafter announced their intention to see the contract through to a sale and scheduled a closing, at which they were prepared to credit defendants for the amount of their earnest money deposit. Defendants did not appear for the closing. Plaintiffs subsequently commenced this action for specific performance.

Plaintiffs moved for summary disposition under MCR 2.116(C)(9) and (10). The trial court determined that defendants offered a valid defense and therefore rejected the (C)(9)

argument. With respect to MCR 2.116(C)(10), the court first held that the parties had extinguished their contract by mutual abandonment. The court then alternatively concluded that, assuming the existence of a valid contract, plaintiffs, having cashed the check for defendants' earnest money deposit and converted the funds to their own use, thereby elected that remedy, thus rendering specific performance unavailable. Accordingly, the court granted summary disposition in favor of defendants pursuant to MCR 2.116(I)(2).

II. Analysis

This Court reviews a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

In addressing the trial court's holding on the election of remedy issue, we begin with the well-known and quite logical proposition, that our duty as judges is to enforce the unambiguous words placed into a contract by the parties. As articulated by the Supreme Court in *Quality Products and Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003):

> In interpreting a contract, our obligation is to determine the intent of the contracting parties. *Sobczak v Kotwicki*, 347 Mich 242, 249; 79 NW2d 471 (1956). If the language of the contract is unambiguous, we construe and enforce the contract as written. *Farm Bureau Mutual Ins Co of Michigan v Nikkel*, 460 Mich 558, 570; 596 NW2d 915 (1999). Thus, an unambiguous contractual provision is reflective of the parties' intent as a matter of law. Once discerned, the intent of the parties will be enforced unless it is contrary to public policy. *Id.*

Here, and as noted in Section I of this opinion, the parties agreed that, if the purchaser failed to comply with the agreement, the seller would have the option to either enforce the terms, or to declare the contract forfeited and "retain the deposit" as liquidated damages. The contract also specified that the deposit was to be held in an escrow account and to be applied to the price if the sale was consummated. However, it is undisputed that plaintiffs, after being informed by defendants that they could not go forward with the sale, retained the earnest money and, in fact, deposited the monies into their own account. As the trial court concluded, this was an unequivocal act[1] whereby plaintiffs elected one of two remedies under the contract. Having

[1] In a February 22, 2006 letter plaintiffs suggested that they were choosing to elect specific performance of the contract, as opposed to retaining the $10,000 as liquidated damages. However, plaintiffs' action of retaining the deposit, and then depositing it into their account, was an unequivocal and final election of a remedy under the contract. Had plaintiffs intended to enforce the agreement, they would not have cashed the check and deposited it into their own account, but would have instead placed the money into an escrow pending a sale.

done so, plaintiffs cannot now utilize the other, alternative remedy, i.e., enforcement of the contract. *Huizenga v Withey Sheppard Assoc*, 15 Mich App 628, 631; 167 NW2d 120 (1969).

For these reasons, we affirm the trial court's conclusion that plaintiffs were not entitled to specific performance.

Plaintiffs additionally argue that the trial court erred in concluding that the parties' extinguished their agreement through mutual abandonment, and also abused its discretion in refusing to allow plaintiffs to amend their complaint to allege promissory estoppel as an alternative theory of recovery.[2] We need not reach these issues. If there was no agreement in effect, there was nothing for plaintiffs to specifically enforce. Conversely, if there was an enforceable agreement in effect, whether through operation of contract or promissory estoppel, then plaintiffs' treatment of the earnest money constituted an election among the available remedies. Accordingly, our resolution of the election issue obviates our need to reach the abandonment and estoppel questions.

Affirmed.

/s/ Donald S. Owens
/s/ Helene N. White
/s/ Christopher M. Murray

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[2] The elements of promissory estoppel are

> (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, (3) which in fact produced reliance or forbearance of that nature, and (4) in circumstances such that the promise must be enforced if injustice is to be avoided. [*Ardt, supra* at 692 (internal quotation marks and citation omitted).]